UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: 23 MAY 1977

SUBJECT: Applicability of PSD Increments over Company Property

FROM: Walter C. Barber, Director
Office of Air Quality Planning and Standards, MD-10

TO: Gordon M. Rapier, Director
Air and Hazardous Materials Division, Region II, 3AHOO

This is in response to your May 9, 1977, memo asking if PSD increments apply over property owned by a new source if the general public is effectively precluded from access to that property. The answer is yes. NOTE: This memo has "yes" crossed out and a handwritten "no" instead.) This issue has been addressed with respect to the NAAQS in OAQPS Guideline 1.2 - 046, "Guidelines for Implementation of a Regional New Source Review Program for Stationary Sources" (a copy of the pertinent page is enclosed), and in the attached memorandum of law from OGC. We believe, and OGC concurs, that the PSD increments should be treated the same as the NAAQS in this respect. Therefore, as indicated in the OGC memo, the test for determining if public access is effectively precluded requires some kind of physical barrier.

If you have any further questions on this matter, please contact me.

Enclosures

cc: Richard G. Stoll, Attorney, Office of General Counsel, A-133
Edward E. Reich, Director, Stationary Source Enforcement Division, EN-340

be allowed to construct. Instead, any source appearing to cause the NAAQS to be exceeded during the screening process should be subjected to a more detailed analysis which carefully considers site-specific data. If a detailed analysis continues to demonstrate that estimated air quality levels of stable pollutants will exceed the NAAQS, it may be necessary to pursue additional considerations which are to be described by the special NSR guidance currently being prepared.

Reactive pollutants (HC-Ox and NOx) are somewhat more difficult to deal with at the present time. Existing modeling techniques do not appear to adequately predict the reactive pollutant impact of specific point sources. Since no acceptable modeling is presently possible, the air quality portion of the NSR need not apply if there is no SIP control strategy demonstration for the area. No permit should be issued, however, until it is carefully determined that all applicable emission requirements are met (see page 31). In many cases it will probably be necessary for the reviewer to refer to the special NSR guidance for non-attainment areas in order to adequately review major sources of HC-Ox and/or NOx.

Air quality concentrations should pe estimated in accordance with the definition of "ambient air." (40 CFR, Section 50.1(e)). The term "ambient air" is defined as that portion of the atmosphere, external to buildings, to which the general public has access. It will be the responsibility of the applicant seeking to have private land excluded from review to provide sufficient assurance (e.g., written statement, photographs, etc.) to EPA that the general public is completely and effectively prohibited from such

land.

Where such assurance is acceptable, air quality standards should be estimated at and beyond the "fenceline" which divides privately-owned space from space considered to be public (accessible to the general public).

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
OFFICE OF THE GENERAL COUNSEL

DATE: September 28, 1972

SUBJECT: Ambient Air Quality Monitoring by EPA

FROM: Michael A. James, Attorney,
Air Quality and Radiation Division

TO: Jack R. Farmer, Chief
Plans Management Branch, SDID

MEMORANDUM OF LAW

FACTS

Your memorandum of September 12, 1972 informs us that the Standards Development and Implementation Division is initiating an air quality sampling program around a number of smelters for which emission regulations were proposed by EPA on July 27, 1972. Potential sites for locating monitoring equipment were based on diffusion model predictions. Some of these sites are on land owned by the smelters, e.g., at Kennecott Copper's Utah Smelter. The monitoring equipment at each of the sites would be operated by EPA personnel.

QUESTION #1

What is the meaning of the phrase "to which the general public has access" in EPA's definition of "ambient air"?

ANSWER #1

We believe that the quoted phrase is most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering.

QUESTION #2

Should a different definition of "ambient air" be made for primary versus secondary standards since secondary standards involve welfare and not the health of persons?

ANSWER #2

EPA's regulation defining "ambient air" makes no such distinction, and we find no suggestion in the Act that Congress intended such a distinction.

QUESTION #3

What type of approval from smelter officials is necessary in order to operate sampling equipment on smelter property?

ANSWER #3

Informal, oral permission is acceptable.

DISCUSSION

1. EPA's regulations prescribing national primary and secondary ambient air quality standards define "ambient air" to mean "that portion of the atmosphere, external to buildings, to which the general public has access."

40 CFR 50.1 (e). What definition in our view limits the standards' applicability to the atmosphere outside the fence line, since "access" is the ability to enter. (See Footnote *) In other words, areas of private property to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property.

2. In our telephone conversations, you have pointed out that this conclusion enables the property owner to determine what constitutes "ambient air" since he may fence his property and thereby preclude public access. This result may indicate that a property line boundary rather than a fence line boundary for ambient air makes better sense. Two factors dictate that this interpretation not be adopted: 1) the ordinary meaning of "access" includes the right or the ability to enter (see

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Footnote *: Webster's Third New International Dictionary (1966) defines "access" to mean "Permission, liberty, or ability to enter."

footnote, above); 2) any definition which limits the scope of applicability of ambient air quality standards must be examined in the light of Section 107 of the Clean Air Act. That section provides that "Each State shall have the primary responsibility for assuring air quality within the entire geographic area compromising such State..." (emphasis added). In our view, a definition of "ambient air" that excepts fenced private property (or public lands) from the applicability of the Act is probably inconsistent with the quoted statutory language; expanding the exception beyond its current limits is clearly not legally supportable.

3. An argument can be made that the existing 40 CFR 50.1 (e) is not inconsistent with Section 107 of the Act insofar as primary standards are concerned, because those standards are concerned with public health and the definition is directed at the general public's exposure to risks. This argument does not apply, however, in the case of secondary standards, which are to protect against adverse effects on "...soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate" and "damage to and deterioration of property...as well as effects on economic values and on personal comfort and well being". Even assuming for the sake of argument that any of the tangible things in the quoted list may be harmed by air pollution without contravening the law if they are upon fenced private property, it is highly unlikely that adverse effects upon weather visibility, and climate can be so restricted. In addition, it is clear that despoilation of the landscape may affect the personal well-being of many individuals in the psychic sense, even if some sort of barrier separates them from the despoilation.

4. If any problems arise regarding the activities of Federal employees upon private lands, please contact me and I will confer with our Grants and Procurement Division.

MAY 9, 1977

Applicability of PSD Increments Over
New Source's Property

Gordon M. Rapier, Director
Air & Hazardous Materials Division, 3AHOO

Walt Barber, Director
Office of Air Quality Planning and Standards, (MD-10)

In implementing the PSD program we have encountered a number of questions concerning the applicability of the PSD increments over the property area owned by the new source. In other words, are those emissions from the new source which impact within the property boundaries of that new source subject to the PSD increment constraints if the general public is effectively precluded from access to that property?

If it is agency policy to exempt the requirements of the PSD increments over the source's property, then what types of restraints (e.g. fences, no-trespassing signs, etc.) are considered necessary to effectively prevent public access to that property?

We currently have a number of PSD source applications under review which will be directly affected by the agency's position on this issue. Therefore, an early response from you on this matter will be greatly appreciated. If you have any questions on specific PSD projects, please contact me at 215/597-8131 or Mr. Jim Sydnor of my staff at 215/597-8181.

cc: Edward E. Reich (EN-341)
Director, DSSE